APPENDIX A—Oregon Court of Appeals Decision

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

ALONSO ALVINO HERRERA,
aka Alonso Alvino Anto Herrera,
Defendant-Appellant.

Multnomah County Circuit Court
080331346

A141205

ORDER OF SUMMARY AFFIRMANCE

Before Wollheim, Presiding Judge, and Brewer, Chief Judge.

Respondent has moved, pursuant to ORS 138.660, for summary affirmance on the ground that the appeal does not present a substantial question of law. The motion is granted. *State* v. *Cobb*, 224 Or App 594, 198 P3d 978 (2008), *rev den*, 346 Or 364 (2009).

Affirmed.

FEB 22 2010 /s

DATE

Robert Wollheim,
Presiding Judge

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent
[ ] Costs allowed, payable by:

APPENDIX B—Oregon Supreme Court Denial of Review

IN THE SUPREME COURT
OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
Respondent on Review,

v.

ALONSO ALVINO HERRERA,
aka Alonso Alvino Anto Herrera,
Defendant-Appellant,
Petitioner on Review

Court of Appeals
A141205

S058364

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

June 11, 2010
DATE

/s
CHIEF JUSTICE

APPENDIX C—Trial Court Denial of Motion for Unanimous Verdict Instruction

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,
Plaintiff-Respondent,

v.

ALONSO ALVINO HERRERA,
aka Alonso Alvino Anto Herrera,
Defendant-Appellant.

Case No. 0803-31346

Excerpt from the Transcript of Proceedings for August 25, 2008:

[22] * * * MS. HORNE [defense attorney]: I have presented to the Court a memorandum of law in support of a motion for a jury unanimity, an instruction for the same. I filed that this morning. * * *

[25] * * * [I]n that the Constitution of Oregon in allowing a nonunanimous verdict does indeed violate the federal Constitution and the defendant's right under the Sixth Amendment to a unanimous verdict, we would ask that you grant him a unanimous verdict in this case. * * *

MR. MICKLEY [prosecutor]: * * *

[26] * * * [T]he Court of Appeals, the Supreme Court of Oregon, and the Supreme Court of the Unit-

ed States have all confirmed Oregon's 10-2 voting requirement and I'd ask the Court to deny the motion for unanimous jury verdict.

THE COURT: And the state of the law in Oregon at this point makes it clear that that is the state of the law in Oregon, and so I will deny the motion and we will see what happens in the Supreme Court.

APPENDIX D—Announcement of Nonunanimous Vote on the Verdict

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,
Plaintiff-Respondent,

v.

ALONSO ALVINO HERRERA,
aka Alonso Alvino Anto Herrera,
Defendant-Appellant.

Case No. 0803-31346

Excerpt from the Transcript of Proceedings for August 25, 2008:

[140] * * * THE COURT: * * * So were these, both of these decisions, were they unanimous decisions or not unanimous decisions? [141]

A JUROR: They were not.

THE COURT: Okay. Can you tell me what the count was for Count 1?

A JUROR: 10 to 2.

THE COURT: Okay. Okay. And what about Count 2?

A JUROR: 11 to 1 for not guilty. * * *

APPENDIX E—Preservation of Objection to Nonunanimous Jury Instruction

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,
Plaintiff-Respondent,

v.

ALONSO ALVINO HERRERA,
aka Alonso Alvino Anto Herrera,
Defendant-Appellant.

Case No. 0803-31346

Excerpt from the Transcript of Proceedings for August 25, 2008:

[107] * * * MS. HORNE [defense attorney]: Judge, just so I make sure that I've got my — my record for appeal as clean as possible should I need it, no matter how fervently I argue about jury instructions, I always have to make an exception.

THE COURT: Absolutely. That's fine.

MS. HORNE: I would — I would except — take an exception to having given the standard jury instruction 10.13, the verdict in a felony case. You did instruct the jurors that they could be non — other than unanimous, and we take exception to that. * * *

THE COURT: Anything for the record, Mr. Mickley [prosecutor]?

MR. MICKLEY: No, Your Honor. * * *

APPENDIX F—Preservation of Argument in Petitioner's Brief in the Oregon Court of Appeals

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

ALONSO ALVINO HERRERA,
aka Alonso Alvino Anto Herrera,
Defendant-Appellant.

Multnomah County Circuit Court
080331346

A141205

APPELLANT'S BRIEF AND
EXCERPT OF RECORD[, pp. 14–17]

II. THE UNITED STATES CONSTITUTION FORBIDS CONVICTION BY LESS THAN A UNANIMOUS VOTE.

If the United States Supreme Court were to revisit the issue of nonunanimous guilty verdicts today, it would disavow its precedent and strike down Oregon's present system. *Apodaca v. Oregon*, 406 US 404 (1972), was wrongly decided by a split Court and, under the view of the Sixth Amendment now adopted by a majority of the justices, is no longer good law.

A generation and more after *Apodaca*, Oregon and Louisiana continue to be the only two states to permit nonunanimous verdicts in criminal cases. The remaining forty-eight states, together with the federal government, require unanimous verdicts for criminal convictions.

The deciding vote in *Apodaca* was supplied by Justice Powell, whose rationale was that the Fourteenth Amendment's Due Process Clause did not incorporate the Sixth Amendment's jury unanimity requirement[11] against the states, leaving the unanimity requirement inapplicable in state court prosecutions. *Cf. Gann*, 254 Or at 577 (Goodwin, J., concurring in part and dissenting in part) ("the right to a unanimous jury verdict in a criminal trial is so fundamental to liberty under the American scheme of justice as to amount to a due-process right").

Justice Powell's rationale has been so seriously undermined by the line of cases beginning with *Apprendi*, 530 US 466, and continuing with *Blakely*, 542 US 296, and *United States v. Booker*, 543 US 220 (2005), that it is no longer controlling. For example, in his opinion for the Court in *Blakely*, Justice Scalia explained that the by-now-well-known *Apprendi* rule "reflects two longstanding tenets of common-law criminal jurisprudence," the first of which is "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours[.]'" *Blakely*, 542 US at 301, quoting 4 William Blackstone, Commentaries on the Laws of England 343 (1769) (emphasis added); see also *Booker*, 543 US at

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[11] That the Sixth Amendment requires jury unanimity is settled law. *Andres v. United States*, 333 US 740, 748 (1948).

239; *Apprendi*, 530 US at 477 (each quoting Blackstone identically).[12]

The *Apprendi* line of cases confirms that, as Justice Goodwin stated forty years ago,

> for more than five centuries Englishmen knew that they could not be convicted of crime except by the unanimous verdict of twelve peers. Moreover, by the time of the American Revolution, the protection of unanimity in criminal cases was one of the Englishman's most cherished rights.
>
> There is no reason to believe that the American colonists who adopted our Bill of Rights abandoned their English tradition with respect to trial by jury. Indeed, the evidence strongly suggests that the Sixth Amendment guaranteed of a jury trial in all criminal cases was intended to incorporate all the elements of a jury trial that were deemed protective of individual liberty in this country

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[12] The right of jury trial is at least as old as Article XXXIX of Magna Carta. *See* Thomas Andrew Green, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 165 (1985); FROM MAGNA CARTA TO THE CONSTITUTION: DOCUMENTS IN THE STRUGGLE FOR LIBERTY 1, 47 (D. Brooks ed. 1993). The right came into this country by way of Article 7 of the Declarations of the Stamp Act Congress, the Declaration and Resolves of the First Continental Congress, and the Declaration of Independence. *See* FROM MAGNA CARTA TO THE CONSTITUTION at 48, 55, 59. For federal prosecutions, the right to trial by jury was guaranteed by Article III, §2 of the United States Constitution. The right is reiterated in the Sixth Amendment, which applies to state court prosecutions. *Duncan v. Louisiana*, 391 US 145 (1968). For additional information on the jury trial clause's origin, *see id.* at 152-153.

> and in England when the Constitution was adopted.
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> "Those elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous." [*Patton v. United States*, 281 US 276, 288 (1930).]

Gann, 254 Or at 578-579 (Goodwin, J., concurring in part and dissenting in part) (footnotes and citations omitted).

In holding that the Sixth Amendment right to jury trial is incorporated into the Fourteenth Amendment's Due Process Clause, and therefore applicable in state court prosecutions, this Court stated "that in the American states, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Duncan*, 391 US at 157-158. *Apprendi* and its progeny establish that the exact same things are true about the Sixth Amendment's unanimous verdict guarantee. That is, the unanimity requirement is a principle "of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 US 97, 105 (1934). It is "basic in our system of jurisprudence," *In re Oliver*, 333 US 257, 273 (1948), and "is necessary to an Anglo-American regime of ordered liberty," *Duncan*, 391 US at 149 n. 14.

It is clear that, notwithstanding *Gann* and *Apodaca*, the Fourteenth Amendment's Due Process Clause, as it incorporates the jury trial right, equally incorporates the unanimity requirement. This requirement thus applies to state prosecutions. Oregon's nonunanimous guilty verdict authority is therefore void. The Court erred when it instructed the jury that it could convict by a nonunanimous vote. The Court further erred in ordering that a judgment of conviction be entered based on the jury's nonunanimous vote of guilty on Count One. * * *

APPENDIX G—Preservation of Argument in Petitioner's Petition for Review to the Oregon Supreme Court

IN THE SUPREME COURT
OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
Respondent on Review,

v.

ALONSO ALVINO HERRERA,
aka Alonso Alvino Anto Herrera,
Defendant-Appellant,
Petitioner on Review

Court of Appeals
A141205

S058364

PETITION FOR REVIEW OF ALONSO ALVINO HERRERA[, pp. 12-15]

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Justice Powell's rationale has been so seriously undermined by the line of cases beginning with *Apprendi*, 530 US 466, and continuing with *Blakely*, 542 US 296, and *United States v. Booker*, 543 US 220, 125 S Ct 738, 160 L Ed 2d 621 (2005), that it is no longer controlling. For example, in his opinion for the Court in *Blakely*, Justice Scalia explained that the by-now-well-known *Apprendi* rule "reflects two longstanding tenets of common-law criminal jurisprudence," the first of which is "that the 'truth of every accusation' against a defendant 'should after-

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mental." *Snyder v. Massachusetts*, 291 US 97, 105, 54 S Ct 330, 78 L Ed 674 (1934). It is "basic in our system of jurisprudence," *In re Oliver*, 333 US 257, 273, 68 S Ct 499, 92 L Ed 682 (1948), and "is necessary to an Anglo-American regime of ordered liberty," *Duncan*, 391 US at 149 n. 14.

It is clear that, notwithstanding *Gann* and *Apodaca*, the Fourteenth Amendment's Due Process Clause, as it incorporates the jury trial right, equally incorporates the unanimity requirement. This requirement thus applies to state prosecutions. Oregon's nonunanimous guilty verdict authority is therefore void. The Court erred when it instructed the jury that it could convict by a nonunanimous vote. The Court further erred in ordering that a judgment of conviction be entered based on the jury's nonunanimous vote of guilty on Count One. After receiving word of the jury's status in open court, the Court should have declared a mistrial. The remedy at this stage is to reverse defendant's conviction and order a new trial. * * *